

ESTTA Tracking number: **ESTTA129339**

Filing date: **03/12/2007**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Dr Pepper/Seven Up, Inc.
Granted to Date of previous extension	03/25/2007
Address	5301 Legacy Drive Plano, TX 75024 UNITED STATES
Attorney information	Barbara A. Solomon Fross Zelnick Lehrman & Zissu, P.C. 866 United Nations Plaza New York, NY 10017 UNITED STATES bsolomon@frosszelnick.com Phone:212-813-5900

Applicant Information

Application No	78806994	Publication date	09/26/2006
Opposition Filing Date	03/12/2007	Opposition Period Ends	03/25/2007
Applicant	Crush Entertainment, Inc. 21363 Lassen, Suite 101 Chatsworth, CA 91311 UNITED STATES		

Goods/Services Affected by Opposition

Class 041. First Use: 2005/01/10 First Use In Commerce: 2005/01/10
All goods and services in the class are opposed, namely: Online entertainment services, namely, providing adult-themed photos and videos via the Internet

Attachments	Notice of Opposition (f0019604).pdf (7 pages)(210147 bytes)
Signature	/Barbara A. Solomon/
Name	Barbara A. Solomon
Date	03/12/2007

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 78/806,994
Mark: CRUSH
Filed: February 3, 2006
Published in the *Official Gazette* on September 26, 2006

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DR PEPPER/SEVEN UP, INC.,

Opposer,

- against -

CRUSH ENTERTAINMENT, INC.

Applicant.
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NOTICE OF OPPOSITION

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

BOX TTAB - FEE

Opposer Dr Pepper/Seven Up, Inc. ("Opposer"), a company organized and existing under the laws of the State of Delaware, with its principal place of business at 5301 Legacy Drive, Plano, Texas 75024, believes that it would be damaged by the issuance of a registration for the trademark CRUSH, applied for in application Serial No. 78/806,994 for "online entertainment services, namely, providing adult-themed photos and videos via the Internet" in International Class 41 and therefore opposes the same. As grounds for the opposition, Opposer, by its attorneys Fross Zelnick Lehrman & Zissu, P.C., alleges as follows:

1. Since at least as early as 1916 and continuing through the present, Opposer, through its predecessors in interest, has used the marks ORANGE CRUSH and CRUSH (collectively, the "CRUSH Marks") for beverage products.

2. CRUSH brand beverages are sold in convenience stores, delis, supermarkets, mass merchandisers, wholesale clubs and gas stations throughout the United States. Millions of bottles and cans of CRUSH-branded beverages have been distributed in the United States with sales in the millions of dollars. Opposer and its predecessors-in-interest have been using the CRUSH Marks on beverages continuously for a period commencing long prior to any date on which Applicant can rely up to the current date.

3. Due to the extreme popularity of CRUSH-branded products, there have been significant opportunities for Opposer to expand its use of the CRUSH Marks. In addition to using the CRUSH mark in connection with beverages, Opposer uses the CRUSH mark on candy and confectionery which products are sold nationwide. Further, Opposer has licensed the CRUSH mark for use in connection with flavored lip balm, vitamin C drops and clothing. Recently, Opposer licensed its CRUSH mark for use in connection with frozen novelties, including ice pops, ice cream cones and related goods.

4. Opposer takes great care in determining how its CRUSH marks will be used and in ensuring that the products on which the CRUSH marks are used reflect positively on the company. Opposer ensures that its products are suitable for people of all ages and that its marks are used in connection with wholesome and family-oriented goods and services.

5. Opposer is the owner by assignments recorded in May, 2006 of numerous U.S. trademark registrations for the CRUSH Marks including, but not limited to:

<i>Mark</i>	<i>Reg'n No.</i>	<i>First Use Date</i>	<i>Class and Goods</i>
CRUSH	2,895,772	October 31, 1999	IC 30: confectionery, namely candy
CRUSH	2,536,979	September, 1999	IC 30: Soft candies
CRUSH and Design	2,418,266	June 1, 1999	IC 32: soft drinks and concentrates for making the same

CRUSH (Stylized)	2,418,265	June 1, 1999	IC 32: soft drinks and concentrates for making the same
ORANGE CRUSH	683,361	June 15, 1916	IC 32: non-alcoholic, maltless orange-flavored beverages and concentrates and compounds for making the same
CRUSH	187,791	1915	IC 32: non-alcoholic, maltless beverages and concentrates and compounds for making the same

All of the registrations set forth above are valid, subsisting and in full force and effect, all serve as prima facie evidence of Opposer's exclusive rights in and to the registered marks, all establish that Opposer's rights in the CRUSH Marks are long-prior to any rights on which Applicant can rely, and all serve to place Applicant on notice of Opposer's rights. In addition, U.S. Registration No. 683,361 is incontestable and as such constitutes conclusive evidence of Opposer's exclusive right to use the CRUSH mark on the goods specified therein pursuant to Sections 7 and 33 of the Lanham Act, 15 U.S.C. §1057, 115(b).

6. Through the years of use and advertising of CRUSH and as a result of the expenditure of significant resources by Opposer and its predecessors to promote CRUSH products, Opposer through its predecessors has established strong common law rights in the CRUSH Marks in addition to its rights flowing from its federal registrations. The CRUSH Marks have come to be associated uniquely with Opposer, represent enormous goodwill of Opposer and identify and distinguish goods manufactured, approved of or licensed by Opposer from those of others.

7. By virtue of Opposer's extensive sales, advertising and promotion of goods under the CRUSH Marks, the CRUSH Marks have come to symbolize the high quality of Opposer's products and represent Opposer's reputation for high-quality, family-friendly and appropriate

goods. As a result of Opposer's substantial effort and investment on behalf of its brand, the goodwill inherent in the CRUSH Marks is an enormously valuable asset of Opposer.

8. As a result of the long use, registration and renown of the CRUSH Marks, Opposer's CRUSH Marks are entitled to an extremely broad scope of protection.

9. Upon information and belief, Applicant is a Nevada corporation located and doing business at 21363 Lassen, Suite 101, Chatsworth, California 91311.

10. On or about February 3, 2006, Applicant filed application Serial No. 78/806,994 for the mark CRUSH for adult-themed online entertainment based on use as of January 10, 2005.

11. As a matter of law, at the time the application herein opposed was filed Applicant was on constructive notice of Opposer's rights in the CRUSH Marks based on Opposer's federal trademark registrations for the same. Upon information and belief, as a result of Opposer's and its predecessors' extensive use of the CRUSH Marks for almost 90 years, Applicant was on actual notice of Opposer's or its predecessors' prior rights in and to the CRUSH Marks as of its first use date and as of its filing date.

12. The first use date claimed by Applicant of January 10, 2005 and the filing date of the application are both decades after the use, registration and acquisition of rights in the CRUSH Marks by Opposer or its predecessors-in-interest. As such, Opposer's rights in its CRUSH Marks are prior and superior to any rights Applicant may claim in the mark CRUSH.

13. Applicant's first use date and its filing date are both well after Opposer's CRUSH Marks were first used nationwide and became famous nationwide.

14. Applicant's mark is identical to Opposer's prior used and registered CRUSH trademark.

15. Applicant is using the CRUSH mark in connection with sexually explicit materials. Indeed, Applicant maintains a website at *crushvideo.com*. Before one can actually

enter the website, a warning statement appears advising that permission to enter the site and to view its contents “is strictly limited to consenting adults. By proceeding you affirm that you are at least 18 years or older, and that you are voluntarily choosing to view and access such sexually-explicit images and content for your own personal use.”

16. The application herein opposed is not limited with respect to consumers. As a matter of law, Applicant’s services under Opposer’s very CRUSH mark will be available to all customers over 18. As such, Applicant’s consumers could clearly overlap with those consumers who are familiar with Opposer’s CRUSH Marks.

17. Given the renown of Opposer’s CRUSH marks, Applicant’s registration and use of a mark that is identical to Opposer’s CRUSH mark is likely to dilute and/or tarnish the distinctive quality of Opposer’s marks.

18. Registration of Applicant’s mark is inconsistent with Opposer’s prior rights in its CRUSH and ORANGE CRUSH marks, is inconsistent with Opposer’s statutory grant of exclusivity of use of the registered CRUSH Marks, and would destroy Opposer’s investment and goodwill in its CRUSH and ORANGE CRUSH marks.

CLAIM FOR RELIEF UNDER SECTION 2(f)

19. Opposer repeats and re-alleges each and every allegation contained in Paragraphs 1 through 18 as if fully set forth herein.

20. Opposer’s ORANGE CRUSH and CRUSH marks are inherently distinctive, have been used for nearly 90 years in connection with goods sold and advertised nationally, have become well-known among consumers, and are the subject of numerous U.S. federal trademark registrations as identified above, including an incontestable federal trademark registration. As a result, the ORANGE CRUSH and CRUSH marks are famous marks under the Latham Act.

21. Applicant's first use of CRUSH and its application filing date for the CRUSH mark are long after Opposer had been using its ORANGE CRUSH and CRUSH marks nationally, long after Opposer had been selling and advertising its product nationally, long after Opposer had generated significant sales of goods under the ORANGE CRUSH and CRUSH marks nationally and long after Opposer's ORANGE CRUSH and CRUSH marks had become widely recognized by the general consuming public as a designation of source of goods of Opposer.

22. Applicant's mark herein opposed is identical to Opposer's famous registered CRUSH Mark and is substantially similar and almost identical to Opposer's famous registered ORANGE CRUSH Mark.

23. Registration of the mark CRUSH in connection with the services identified in the application opposed herein is likely to dilute, would dilute, and is diluting the distinctive quality of Opposer's ORANGE CRUSH or CRUSH marks by lessening the capacity of Opposer's marks to distinguish exclusively goods and services of Opposer, and is likely to tarnish, would tarnish, and is tarnishing Opposer's CRUSH Marks by associating those marks with pornographic and adult-themed material thereby harming the reputation that Opposer has created in its CRUSH Marks.

24. Registration of CRUSH to Applicant is likely to dilute and tarnish, and is diluting and tarnishing, Opposer's CRUSH Marks in violation of Section 2(f) of the Lanham Act, 15 U.S.C. §1052(f).

25. By reason of the foregoing, Opposer is likely to be harmed by registration of Application Serial No. 78/806,994 for the mark CRUSH.

WHEREFORE, it is respectfully requested that this opposition be sustained and that the registration sought by Applicant in Application S.N. 78/806,994 be denied.

Opposer authorizes the opposition fee in the amount of \$300.00 for one class to be debited from Opposer's attorneys' Deposit Account No. 23-0825-0576900.

Dated: New York, New York
March 12, 2007

FROSS ZELNICK LEHRMAN
& ZISSU, P.C.

By. 

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